S.B. CIVIL WRIT PETITION NO.1134/2005

BHANJI

VS

KAMALJI & ORS.

DATE OF ORDER : 1.3.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. Bheem Arora, for the petitioner.

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Heard learned counsel for the petitioner.

The petitioner is aggrieved against the order dated 20th Dec., 2004 by which the petitioners-defendant's application filed under Order 41 Rule 5 CPC was dismissed by the trial court.

According to learned counsel for the petitioner, the plaintiff in his plaint very specifically pleaded that the defendant got the sale deed executed in his favour from the plaintiff without paying any consideration for the said sale of property and he also pleaded that the defendant-petitioner committed fraud and got the sale deed executed by mis-representing the plaintiff that it is the mortgaged deed. According to learned counsel for the petitioner inspite of the fact that

it was a case of the plaintiff himself that the sale deed is without consideration, still the court has not framed any issue so far as challenge to sale deed is a ground of sale deed being without consideration. According to learned counsel for the petitioner, the trial court framed the issue no.3, which is only that in case the sale deed is declared illegal and null then whether defendant-petitioner is entitled to decree of Rs.1,59,695/- alongwith interest. According to learned counsel for the petitioner, by impugned order, the trial court even observed that this will be burden of the petitioner-defendant to prove that said consideration was paid. According to learned counsel for the petitioner, it will mean that even if the plaintiff will fail to prove that no consideration was paid for sale of the land, still the defendant will have to prove that he has paid the consideration for the sale of the property. Learned counsel for the petitioner submits that in view of the above reasons, the issue proposed by the petitioner should have been framed by the trial court.

I considered the submissions of learned counsel for the petitioner. It is true that there is no specific mention in the issue no.1 that the sale deed was executed without consideration, but the issue is required to be read in the light of the pleading. When registered document is challenged, it is the party who challenges the document is required to prove his case on the basis of the fact pleaded in the plaint

and in this case when one of the component of the alleged fraud is non-payment of the consideration by the defendant then certainly the said plea is very much included in the issue no.1 already framed by the trial court. Assuming for the sake of arguments that plaintiff do not want to press this plea about sale without consideration and he failed to establish that allegation and still court find the sale deed illegal and null on other grounds, the question of non-payment of consideration by the defendant to the plaintiff cannot be available to the plaintiff as that will amount to consciously relinquishing the allegation of absence of consideration for the sale deed.

In view of the above reasons when both the parties led their evidence and the case has been fixed for final arguments and the arguments were going on and if the court has not framed the issue as proposed by the plaintiff, I do not find that either of the party may suffer any prejudice.

In view of the above, I do not find any reason to interfere in the impugned order passed by the court below. Hence, the writ petition of the petitioner is dismissed.

(PRAKASH TATIA), J.

c.p.goyal/-